IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

NO. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[Chapter VIII, Rule 32(2) (b)]

Criminal Appeal No. 1526/2001
(Old No. 2291/1999)

Gopal Dutt — Appellant.

Vs.

State — Respondent.

Decided on 11-11-2005

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(Irshad Hussain, J.)

(B.S.Verma, J.)

Dated: 11-11 -2005

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 1526 of 2001

Gopal Dutt S/o Narayan Dutt,
R/o Village Tharali Post Office Tharali,
Tehsil Tharali, District Chamoli ……. Appellant.

Vs.

State …… Respondent.

Sri Rajendra Kotiyal, learned counsel for the appellant.
Sri A.Rab learned Addl. GA assisted by Ms. Nishat Intezar, learned Brief Holder for the State.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma ,J.

Dated: 11-11-2005

Per: Hon'ble Irshad Hussain, J.

Accused Gopal Dutt has come up in appeal from his conviction and sentence to imprisonment for life under Section 302 I.P.C. per Judgment and order dated 30-8-1999, passed by then Sessions Judge, Chamoli, in Sessions Trial No. 47 of 1995. However, the other two accused Surpal Singh alias Suri and Dinesh Chandra were acquitted of the charge under Section 302/34 I.P.C.

2- Briefly stated that facts of the case are that on 14-3-1995 at about 9 P.M. Heera Singh deceased had retired to sleep in the first floor of his shop along with his daughter Smt. Devki Devi. Some time thereafter accused Gopal Singh knocked the door and asked the deceased to open the door. On insistence of accused the door was opened and accused entered inside the shop. The accused was carrying with him liquor. He offered the liquor to deceased who hesitatingly acceded to the request and these two together have had liquor session in the room. After consuming the liquor accused wanted to take liberty from Smt. Devki Devi to the displeasure of not only the said lady but also her father Heera Singh deceased. In order to save the honour of the daughter Heera Singh locked her in

the ground floor room. After some time Smt. Devki Devi was alleged to have heard the noise of scuffle in the upper room then occupied by her father and the accused. She also heard her father telling the accused that he had sum of Rs. 32,000/- with him. Some time thereafter Smt. Devki Devi also heard the voice of her father saying " तूने मुझे मार दिया है " She also heard the noise of opening of a box kept in the upper room. When in the morning Smt. Devki Devi woke up she found the door of the room latched from outside. She then picked up a sickle and broke-open the latch and came out and went up in the room. She then found her father Heera Singh lying dead with bleeding injuries.

3- What happened next may be mentioned by stating that Smt. Devki Devi got scribed the written report, Ext. Ka.1 from Bhopal Singh and delivered it at the Reporting Out Post, Tharali at 1-00 P.M. on 15-3-1995. On the basis of the written report, check F.I.R., Ext. Ka.4 was drawn up and case under Section 302 I.P.C. was registered against the accused Gopal Dutt Pant. Entry in the general diary vide report No. 9 of the same date and time, Ext. Ka.5 was also made. Investigation of the case was taken up by the incharge Reporting Out Post Sri Mithlesh Kumar Barthwal who after completion of the initial formalities of the investigation at the police station left for the scene of the occurrence and on reaching there held inquest on the dead body of Heera Singh. He prepared inquest report, Ext. Ka.3 and other relevant documents. Empty liquor bottles and two glasses were attached from the room vide memo, Ext. Ka.10. The dead body was dispatched for post mortem examination which was performed at 12 noon on 16-3-1995 by Dr. Mayank Upadhyaya. During the investigation from the interrogation of Smt. Devki Devi the names of two other culprits Surpal Singh alias Suri and Dinesh Chandra Joshi also came in light and on completion of the investigation charge sheet, Ext. Ka.7 was placed against the accused- appellant and two others by the second investigation officer, S.I. Dinesh Chandra Baunthiyal. The accused and the other two pleaded innocence and claimed that they have been falsely implicated in the case by the police.

4- During trial, prosecution in order to bring home guilt to the accused and two others, relied upon the evidence of eight witnesses. P.W.1, Smt. Devki Devi the informant daughter of Heera Singh deceased narrated the version as was made by her in written report, Ext. Ka.1 besides claiming that Surpal Singh alias Suri and Dinesh Chandra have also reached inside the room in drunken state after her father and accused Gopal Dutt have together already consumed liquor in that night. She, however, stated that accused Gopal Dutt had told her that she will be paid sum of Rs. 8,000/- if she would not disclose the names of other two culprits.

5- P.W.2, Dr. Mayank Upadhyaya, the autopsy surgeon proved autopsy report, Ext. Ka.2 and gave out that following ante-mortem injuries were detected on the person of the deceased:-

1- A contusion 2cm x 2cm dark brown in colour present over front left side of head, 8cm above middle of left eyebrow.
2- 4 contusions 3cm x 1cm present, 2.5 cm below first contusion, dark brown in colour.
3- 4 contusions 9cm x 2.5 cm extending from outer angle of left eye vertically upward ending in a depression of the size 5cm x 4cm, dark brown in colour.
4- A contusion 4.5 cm x 2.5 cm along a depression starting from inner angle of left eye to middle of left eyebrow.
5- A linear abrasion 8cm x 2cm vertically placed over front left side of chest, 3cm medial to breast, dark brown in colour, upper end of abrasion is rounded.

On internal examination fracture of frontal bone under upper end (with depression) of injury No.3 and injury No.4 were detected. Brain membranes were torn and congested under injury No.3 and 4. Brain was also found congested and torn. In the opinion of the medical officer the death was caused due to shock and haemorrhage as a result of ante-mortem injuries about 36 to 48 hours before the autopsy.

6- P.W.3, Pushkar Singh the brother of the informant, P.W.1 gave hearsay evidence in regard to the facts disclosed to him by his sister when he was summoned to the place of the occurrence. P.W.4, Chait Ram was the witness of inquest. P.W.5, constable

Sambhoo Singh formally proved check F.I.R. and G.D. report of the registration of case. P.W.6, Bhopal Singh was the scribe of the written report. P.W.7, S.I. Dinesh Chandra Baunthiyal was the second investigating officer of the case. He took up the investigation on 27.4.1995 from S.I. Mithlesh Kumar Barthwal and on completion of the investigation submitted the charge sheet against the accused and two others as stated above. P.W.8, S.I. Mithilesh Kumar Barthwal, the first investigating officer has held inquest on the dead body as stated above and completed other formalities of the investigation and prepared site-plan, Ext. Ka. 9 and memo of attachment of empty liquor bottles, Ext. Ka. 10 and memo of attachment of blood-stained mattress cover, Ext. Ka.11. This all was the evidence of the prosecution.

7- No evidence was adduced in defence.

8- The learned Sessions Judge on appreciation of the evidence on record and placing reliance mainly on the evidence of informant P.W.1, Smt. Devki Devi accepted the prosecution version as credible and reliable in regard to the involvement of the accused Gopal Dutt Pant only and the accused was accordingly convicted and sentenced as aforesaid. The other two who also faced trial were held not guilty and were acquitted of the charge under Section 302/34 I.P.C.

9- In support of the appeal learned counsel for the appellant argued that the learned Sessions Judge fell in error in accepting the evidence of P.W.1 as credible although the evidence of the witness itself reveal that she has had no occasion to be there in the shop of her father in the night of the occurrence. Learned counsel also submitted that the claim of the witness that she retired to sleep in the ground floor room of the shop despite having suspected foul play by the accused and assault on her father clearly tell adversely upon her credibility and the learned Sessions Judge was not justified in placing reliance on her evidence to convict the accused.

10- On the other hand learned A.G.A. supported the judgment of the learned Sessions Judge by submitting that the evidence of the informant Smt. Devki Devi fully prove that deceased was lastly seen alive in the company of the accused in the night of the

occurrence and that none other than the accused was responsible for committing the murder of the victim of the case and in a situation like this the learned Sessions Judge was justified in convicting the accused for committing the offence.

11- As noticed above the case of the prosecution rest squarely on the testimony of informant P.W.1, Smt. Devki Devi and the incriminating circumstance that Heera Singh deceased was lastly seen alive in the night of the occurrence in the company of the accused and that none other than the accused would have committed the murder of the deceased. It was not disputed that the death of the deceased was homicidal and whosoever caused him ante-mortem injuries had intended to commit his murder. There was also no dispute about the probable time and place of the occurrence as put forward by the prosecution and also the fact that the investigation officer P.W.8, Mithlesh Kumar Barthwal found the dead body of deceased lying on the bedding of the deceased in his first floor room of the shop in the town of Tharali. Considering this aspects of the matter it need to be seen as to whether the evidence of P.W.1 was appraised in proper legal perspective by the learned Sessions Judge, to draw an inference that her evidence proved that accused was the author of the fatal injuries of the deceased.

12- P.W.1, Smt. Devki Devi was married in village Mathkot of district Almora and according to her she came to visit her parents on 10th of March, 1995 and reached at the parental home in village Deorara. She, however, claimed that on 14-3-1995, the date of the occurrence she was with her father and stayed with him in the shop in the town of Tharali. Learned counsel for the appellant argued that she had not shown any special reason as to why she had decided to remain with her father in the shop on that day although the parental home is situate in village Deorara at a distance of two kilometers only from Tharali as confirmed by her brother P.W.3. Pushkar Singh. To support his argument learned counsel also referred to the statement of P.W.3 who though engaged as a servant in a shop in the town of Tharali used to return to village Deorara everyday after finishing the day's work. It is in the evidence of

P.W.1 that her father was running a tea and eatable shop in the town of Tharali and it was thus submitted that the shop not being a residential accommodation for the family P.W.1 would not have stayed there in the night of the occurrence and that she clearly appear to be a got up witness. Learned counsel also pointed out to the statement of P.W.1 that Km. Janki younger sister of the witness also reside with her father but nothing was shown as to where Km. Janki had gone in that night of the occurrence and argued that this aspect of the matter also create grave suspicion and doubt in the claim of P.W.1 that she stayed with her father in the shop in the night of the occurrence. The submission of the learned counsel can not be said to be out of context because Km. Janki was probably staying in the parental home and in a situation like this P.W.1 was not at all expected to be in the shop in that night when the parental home was not situate at a very big distance from there as referred above.

13- It was further pointed out that P.W.1 claimed that at the time of the inquest she was not present at the place of the occurrence but was in parental house. She also stated that in the morning when she went up from the ground floor room after breaking open the latch of the door she found her father lying dead in the upper storey room. She found a neighbour tailor master at the place. She claimed that she did not tell anything about the incident of the night to the tailor master but asked him to summon her brother who was engaged as a servant in a sweet-meat shop. Learned counsel, in our view rightly highlighted this conduct of P.W.1 in keeping mum on seeing the dead body of her father and not telling anything about the night incident to her neighbour. If the accused had actually visited her father in the night and the two together consumed liquor and thereafter accused tried to take liberty from her and as a result of which she was locked in the ground floor room by her father and thereafter she had heard noise of scuffle in the upper room she would have naturally told all about it to her neighbour who was for the first time seen present near the dead body of her father. Learned counsel argued that the story about the happenings of the night was probably spun out to show presence of the accused in the

house with the deceased and that in the totality of the circumstances of the case and the evidence of the witness the only inference which could be drawn would be that P.W.1 was a got up witness and she was made to falsely implicate the accused in the case.

14- Having considered the evidence of P.W.1 with case and caution the submission made by the learned counsel for the accused can safely be said to be sustainable so as to drawn an inference that P.W.1 was not the natural witness of the occurrence. It is also of significance that according to her when she was locked in the ground floor room she heard noise of scuffle, voice of her father telling the accused that he had sum of Rs. 32,000/- with him and thereafter the voice of the father that he was being killed and despite all this she retired to sleep to wake up only in the morning and then to come out after breaking open the latch of the door of the room. She claimed to have also heard the noise of opening of the box in which the money was perhaps kept by her father. If all this could happen in the knowledge of P.W.1 she would not have retired to sleep thereafter peacefully so as to wake up in the morning and then to come out of the room after breaking open the latch of the door. Here it need to be stated that as is evident from site-plan, Ext. Ka.9, the outer latch/lock of the door of the ground floor room was not noticed to have been broken by an instrument such as sickle, said to have been used by P.W.1. Therefore the claim made by the witness does not at all stand to reason and further her conduct in also not telling anything about the incident of the night at the first available opportunity to her neighbour tailor-master belie her claim. P.W.1 although tried to justify her silence during the night despite having heard the noise of scuffle etc by stating that out of fear she did not raise alarm at that time but in the totality of the circumstances of the case we are not inclined to say that the explanation given by her was plausible. The reason being that if she was confined in a room all alone she could have by locking the door of the room from inside, loudly knocked the door and raised alarm to give caution to outsiders or neighbours instead of taking a decision to retire to sleep peacefully during that night. It need to be pointed out here that the shop of the

deceased was situate in the town of Tharali where the shops of others were also situate and if any alarm was to be raised even during the night neighbours would have been cautioned to reach to the place of the occurrence during the night itself. This aspect of the matter therefore also expose the falsity of the claim of P.W.1 and it clearly appear that she was not present in the shop in the night of the occurrence and she was a got up witness.

15- The above inference is also lent credence to by the fact that according to P.W.1 she was sent to her parental home after her brother P.W.3 reached the scene of the occurrence on getting information about the murder of the deceased through a neighbour tailor-master. According to P.W.1 it was 10 A.M. when she went to her parental house. It does not stand to reason as to why she went to her parental house instead of reporting the matter to the police particularly when her neighbour and brother have already reached there by 10 A.M. on 15.3.1995. The F.I.R. was lodged belatedly at 1-00 P.M. on that day which indicate that P.W.1 was not in the shop of the occurrence and she was most probably brought there later on so as to be projected as the witness of fact and reporter of the incident. The inference also stand supported by the fact that P.W.1 affirmed that when the inquest was held on the dead body of her father she was not there at that place but was at that time in her partental home. Learned Sessions Judge did not, while making appreciation of evidence, take in to account this important aspect of the matter and went on to observe that P.W.1 was the most natural witness of the occurrence. Learned Sessions Judge placed implicit reliance on her claim that she had stayed with her father in that shop during the night of the occurrence although her evidence clearly indicate that she was not there and was later on projected to be the witness of important facts and circumstance as set up by that prosecution.

16- Informant, Smt. Devki Devi also spoke of presence of Surpal Singh and Dinesh Chandra Joshi apart from accused Gopal Dutt in the room with her father and these two were acquitted by the learned Sessions Judge mainly on the ground that they were not named in the F.I.R. Learned Sessions Judge, however, did not take

into account that P.W.1 could have only made such claim only on being tutored to say like this and when she herself was not present with her father during the night of the occurrence. Strangely enough P.W.1 claimed that accused Gopal Dutt promised to pay sum of Rs. 8,000/- to her if she would conceal the names of other two culprits named above. It does not stand to reason as to how the main culprit himself would have asked her not to involve other two persons in the murder of her father. P.W.1 also gave out that she was not aware that the names of the two culprits were not mentioned in the F.I.R., Ext. Ka.1 on account of threat given to her by accused Gopal Dutt and went on to reiterate that she had told the names of other two culprits also to her brother Pushkar Singh (P.W.3) and scribe of the F.I.R. Bhopal Singh (P.W.6). This indicate that the F.I.R. was also not scribed at her instance or on her dictation and the names of the two alleged culprits were thus not mentioned in the report. Here it shall be pertinent to refer to the evidence of scribe Bhopal Singh (P.W.6) who gave out that on 15.3.1995 he was summoned to the police out post by a police-man when he was told that Heera Singh had been murdered. He claimed to have prepared written report on behalf of the informant on the dictation of the sub-inspector and thereafter informant Devki Devi appended her thumb impression on the report prepared by him at the police out post. This witness was not declared hostile by the prosecution. The evidence of the witness make it obvious that the F.I.R. was not prepared at the dictation of the informant P.W.1 and this important aspect of the matter further lent credence to the inference that P.W.1 was not present at the place of the occurrence during the night and she was later on summoned and was then projected as being present there in the shop with her father during the night of the occurrence and was made to append her thumb impression on the report prepared on the dictation of the sub-inspector. Since P.W.1 was not present there at the place of occurrence and she was probably summoned there later on sufficient time was consumed and it thus caused delay in lodging the F.I.R. at 1-00 P.M. on 15-3-1995. As stated in the earlier part of the judgment if P.W.1 was to be there during the night of the

occurrence with her father she would have lodged the report in the early morning hours of 15-3-1995 itself particularly when as claimed her brother P.W.3 was also summoned there through a neighbour tailor-master. The delayed F.I.R. in the manner it was prepared thus clearly indicate falsity of the claim of the prosecution and the evidence of P.W.1. In connection with the preparation of the written report and the statement of scribe Bhopal Singh (P.W.6) learned Sessions Judge observed that since the clerk constable P.W.5 who has drawn the check F.I.R. and the relevant G.D. report of the registration of the case and also the first investigating officer S.I. Mithlesh Kumar Barthwal (P.W.8) in whose presence the case was registered at the reporting out post Tharali have not been given any suggestion that the written report was prepared at the police out post at the dictation of the sub inspector, the statement of scribe, P.W.6 was not sufficient enough to support the submission made on behalf of the accused. As stated above, P.W.6 was not declared hostile by the prosecution. P.W.8, S.I. Mithlesh Kumar Barthwal was examined as a witness in the case thereafter and that as an attempt to salvage the damage he could have stated in his examination in chief that the written report, Ext. Ka.1 was not prepared at the police out post on his dictation. In a situation like this the defence was not obliged to give any suggestion either to P.W.8 or to P.W.5 in regard to the claim made by the scribe Bhopal Singh that the written report was, in fact, prepared at the police out post on the dictation of the sub-inspector and that the same was not prepared at the instance of informant, P.W.1. Therefore, the reasoning of the learned Sessions Judge in rejecting the statement of scribe P.W.6 and coming to the conclusion that the written report of the case was a genuine document and it was prepared at the dictation of informant P.W.1 was not based on proper appreciation of the evidence on record.

17- In the above backdrop it can also safely be said that the learned Sessions Judge was not justified in drawing an inference that P.W.1 was the most natural witness of the occurrence and her evidence proved that accused Gopal Dutt visited the deceased in the presence of P.W.1 during the night of the occurrence; that they

together consumed liquor and thereafter accused murdered the deceased with a motive to rob the victim of large sum of Rs. 32,000/-.

18- Some other unimportant aspects of the case were also highlighted by the learned Sessions Judge in the judgment under appeal which do not warrant reference here, particularly when the case of the prosecution as stated above, rest mainly on the evidence of P.W.1 and the alleged incriminating circumstance of the last seen of the deceased with the accused. In other words the relevant and vital evidence of informant P.W.1 having not been found cogent and reliable the allegation of the prosecution that accused murdered the deceased does not stand substantiated and in our view the learned Sessions Judge took a contrary view by not properly appraising the evidence, the facts and circumstances of the case. In other words the charge of murder under Section 302 I.P.C. was not proved beyond doubt against this accused also and he also desrve to be extended benefit of doubt like the other two culprits who were also held not guilty and acquitted in the case by the learned Sessions Judge.

19- For the reasons aforesaid this appeal succeed and is to be allowed accordingly.

20- The appeal is allowed. The judgment dated 30-8-1999 is set aside and the accused Gopal Dutt is held not guilty and is acquitted of the charge under Section 302 I.P.C. He is on bail. His bail bonds are cancelled and sureties are discharged.

23- Let the record be sent back to the trial court for compliance to be reported in two months.

(B.S.Verma, J.) **(Irshad Husssain, J.)**

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